

**DISTRICT OF COLUMBIA**  
**DOH Office of Adjudication and Hearings**  
825 North Capitol Street N.E., Suite 5100  
Washington D.C. 20002

DISTRICT OF COLUMBIA  
DEPARTMENT OF HEALTH  
Petitioner,

v.

SCOE ASSOCIATES  
Respondent

Case No.: I-00-40357

DISTRICT OF COLUMBIA  
DEPARTMENT OF HEALTH  
Petitioner,

v.

SCOE ASSOCIATES  
Respondent

Case No.: C-01-80065

**ORDER DENYING MOTION FOR STAY**

**I. Introduction**

On February 19, 2002, Respondent filed a Notice of Appeal of the February 6, 2002 Final Order in Case No. C-01-80065 and the January 18, 2002 Amended Final Order in Case No. I-00-40357. In Case No. C-01-80065, this administrative court affirmed the Government's proposed non-renewal of Respondent's license to operate a child development facility at 1351-B H Street, NE, pursuant to 29 DCMR 306.1. In Case No. I-00-40357, this administrative court found Respondent liable for violating the provisions of 29 DCMR 311.1 (prohibiting the inspection of a

child development facility) and 29 DCMR 315.2 (failing to provide supervision and administration of a child development facility) at the 1351-B H Street facility, and imposed fines totaling \$550 in accordance with 16 DCMR §§ 3222.1(f) and 3222.3.

Pursuant to D.C. Official Code § 2-1802.03(g), Respondent has requested a stay of these two orders pending appeal. The Government has opposed the grant of a stay. In support of its request, Respondent's sole contention is that, due to its business having been "basically shut down for the past six months" – a characterization of Respondent's operations that has been contested by the Government -- it does not have sufficient income to meet its current expenses, let alone pay any fines.<sup>1</sup>

## **II. Standard of Review**

Pursuant to D.C. Official Code § 2-1802.03(g), "[u]pon request of the respondent, the administrative law judge or attorney examiner may stay the imposition of any sanction imposed pending administrative review." As discussed by this administrative court in *DOH v. Kennedy Center*, OAH No. I-00-11212 at 2 (Order Denying Motion For Stay, August 8, 2001), an administrative judge considering a stay application must apply the same standard as the courts:

---

<sup>1</sup> By order dated February 6, 2002, this administrative court denied Respondent's request of January 30, 2002 for relief from the judgment in Case No. I-00-40357. Respondent's request was based on a similar assertion of economic hardship. See *DOH v. Scoe Associates*, OAH No. I-00-40357 at 2-3 (Order, February 6, 2002). The February 6<sup>th</sup> order expressly permitted Respondent an opportunity to submit a request for a payment plan pursuant to D.C. Official Code § 2-1801.03(b)(5). *Id.* No such request was filed by Respondent, however.

That standard requires a balancing of four factors: “whether the movant [is] likely to succeed on the merits, whether denial of the stay [will] cause irreparable injury, whether granting the stay [will] harm other parties, and whether the public interest favors granting a stay.” *Kuflom v. District of Columbia Bureau of Motor Vehicle Services*, 543 A. 2d 340, 344 (D.C. 1988). If the other three factors strongly favor granting a stay, the moving party need not show a “mathematical probability” of success on the merits; only a “substantial” showing of likely success is required. *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987), quoting *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F. 2d 841, 843 (D.C. Cir. 1977). The court in *Washington Metropolitan Transit Commission* explained that, in considering the “likelihood of success” factor a court need not make “a prediction that it has rendered an erroneous decision” before staying its order. *Id.* at 844. “What is fairly contemplated is that tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained.” *Id.* at 844-45.

It is the movant’s obligation to justify the “extraordinary remedy” of granting a stay of an administrative order. *State of Missouri v. Gabbert*, 925 S.W.2d 838, 839 (Mo. 1996). As such, “[a]n administrative order or decision will not be stayed pending appeal where the applicant has not sustained his or her burden of proof or otherwise has not made the required showings.” *Id.*; see also 16 DCMR 3119.3 (requiring party seeking a stay pending appeal to, *inter alia*, “state the reasons supporting the motion and the facts relied upon.”).

### III. Evaluation of the Relevant Factors

#### A. Irreparable Harm

Respondent has not established that it will suffer irreparable harm in the absence of a stay pending its appeal of Case No. I-00-40357. Ordinarily, an order to pay money will not result in irreparable harm because the party seeking a stay can obtain a refund if it ultimately prevails on appeal. *Accord DOH v. Kennedy Center*, OAH No. I-00-11212 at 3; *see also National Ass’n of Criminal Defense Lawyers v. United States Dep’t of Justice*, 182 F.3d 981, 985 (D.C. Cir. 1999); *Virginia Petroleum Jobbers Ass’n v. Federal Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958). Because Respondent will be able to recover its \$550 payment if it prevails on appeal, a stay is not necessary to prevent the occurrence of irreparable injury in this instance.<sup>2</sup>

Whether Respondent has shown irreparable harm with respect to staying the non-renewal of its license in Case No. C-01-80065 is a somewhat closer question. The inability of Respondent to operate its facility during the pendency of an appeal will likely create a substantial economic hardship. While substantial economic hardship alone is insufficient to establish irreparable harm, *see Virginia Petroleum Jobbers Ass’n*, 259 F.2d at 925 (noting “[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough” to establish irreparable harm), Respondent likely would not be compensated for economic opportunities that occurred during the pendency of an ultimately

---

<sup>2</sup> In its request for a stay, Respondent represented that its childcare subsidy income from the D.C. Department of Human Services for the month of December, 2001 was \$1,677.86.

successful appeal. *See Securities & Exchange Comm'n v. Credit Bancorp, Ltd.*, No. 99 Civ. 11395, 2001 U.S. Dist. LEXIS 1667 at \*8 (S.D.N.Y. Feb. 21, 2001) (noting economic loss may constitute irreparable harm “if it is severe enough and there is *little possibility* that adequate compensatory relief would be available”) (emphasis supplied). As such, I conclude that Respondent has established that it will suffer irreparable harm with respect to the non-renewal of its license in the absence of a stay.

## **B. Harm to Other Parties**

The Government’s interest in prompt enforcement of the District’s child development facility laws will be impaired if a stay is granted. Delayed payment of the assessed fine in Case No. I-00-40357 would lessen its deterrent effect. *Accord DOH v. Kennedy Center*, OAH No. I-00-11212 at 3. In addition, based upon this administrative court’s findings in Case No. C-01-80065 of “persistent, uncorrected and substantial regulatory violations” at the 1351-B H Street facility -- including the inability of Government inspectors to gain access to the facility for purposes of conducting a inspection and/or to complete an inspection on at least five separate occasions over the course of just four months -- allowing Respondent to continue its operations pending appeal would create a significant and, therefore, unacceptable “risk to the health, safety and welfare of young children.” *DOH v. Tots Nursery School*, OAH No. C-00-80001 at 4-5 (Final Order, November 14, 2000); *see also DOH v. Scoe Associates*, OAH No. C-01-80065 at 15-17 (Final Order, February 6, 2002); Government’s Opposition to Stay at 2 n.2. Such a result is wholly antithetical to the Government’s charge under 29 DCMR Chapter 3 to do its best to

safeguard such children. *See* Government’s Opposition to Stay at 2. Therefore, the grant of a stay would harm the Government.

**C. The Public Interest**

Respondent has made no showing that the public interest favors the grant of a stay. Respondent merely represents that, from the standpoint of its individual business, it would be a hardship to pay the assessed fine. Balanced against that largely private interest is the substantial public interest, as referenced above, in requiring the prompt payment of fines (and the resulting deterrent effect), as well as the non-renewal of the license of a child development facility that has been found to have repeatedly created a significant threat to our most vulnerable citizens, *i.e.*, our children. *See DOH v. SCOE Associates*, OAH No. C-01-80065 at 15-20; *DOH v. Scoe Associates*, OAH No. I-00-40357 at 22-27 (Amended Final Order, January 18, 2002). Therefore, the public interest weighs strongly against the grant of a stay.

**D. Likelihood of Success on the Merits**

Finally, Respondent has not made any showing – let alone a substantial one -- of a likelihood of success on the merits. The evidence of Respondent’s repeated regulatory violations offered over the course of a three-day hearing was clear, substantial and convincing. Moreover, the matters addressed in these cases, although fact-intensive, do not present any novel or “difficult legal questions” that would warrant maintaining the *status quo* pending Respondent’s

appeal. See *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977).

### **III. Conclusion**

In its request for a stay, Respondent merely references its current financial difficulties as support. Such a reference, without more, does not satisfy Respondent's obligation to justify the extraordinary remedy of staying an administrative order. A review by this administrative court of the relevant factors reveals that, while Respondent may suffer irreparable harm with respect to the denial of a stay pending its appeal of the proposed licensure non-renewal in Case No. C-01-80065, that individual harm is significantly outweighed by the public harm if Respondent were allowed to continue its operations. Moreover, none of the relevant factors favor the grant of a stay pending Respondent's appeal of Case No. I-00-40357. Accordingly, Respondent's motion will be denied in its entirety.

**IV. Order**

Based upon the foregoing discussion and the entire record in this matter, it is, this  
\_\_\_\_\_ day of \_\_\_\_\_, 2002:

**ORDERED**, that Respondent's motion for stay pending appeal in Case Nos. I-00-40357  
and C-01-80065 is **DENIED**.

/s/      **03/04/02**

---

Mark D. Poindexter  
Administrative Judge